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Open-ended Working Group taking forward multilateral nuclear disarmament negotiations[1]

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Item 5 (a) of the agenda
Taking forward multilateral nuclear disarmament negotiations: concrete effective legal measures, legal provisions and norms that will need to be concluded to attain and maintain a world without nuclear weapons

Consolidated answers to the guiding questions submitted by Panel I on substantively addressing concrete effective legal measures, legal provisions and norms that will need to be concluded to attain and maintain a world without nuclear weapons

Submitted by Brazil

What are the essential elements that would comprise effective legal measures, provisions and norms for attaining and maintaining a world without nuclear weapons?

1. The 2013 Open-ended Working Group to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons has already begun to answer this question in its final report (A/68/514), which should be the basis for further work. In this sense, the current Open-ended Working Group should retrieve the distinction made in that report between *interim* legal measures (para. 28) and end-state legal measures (para. 29) for a world without nuclear weapons, and continue from there.

2. The end-state legal measures comprise a core set of prohibitions and obligations, to be applied non-discriminatorily to all States, regarding nuclear weapons themselves and nuclear fissile material. The main elements of both these categories should be:

(a) All States should be prohibited to use, possess, stockpile, transfer or receive, produce and develop nuclear weapons, and also to aid or abet other States seeking to do so.

[1] Established pursuant to resolution 70/33 of the General Assembly of the United Nations.

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The prohibition to develop nuclear weapons should unambiguously include tests in all their forms, including subcritical experiments and computational simulations.

(b) All existent fissile material should be placed under international safeguards. States should be prohibited to produce, stockpile, transfer or receive fissile material for nuclear weapons. Small quantities of highly-enriched uranium or separated plutonium should be allowed for research purposes and, where there is no LEU alternative, civilian as well as non-proscribed uses. These should be put under the strictest international safeguards. All prohibitions and safeguarding obligations should be non-discriminatory.

3. On one hand, end-state legal measures can be elaborated in a straightforward manner. On the other, *interim* measures – those leading up the total elimination of nuclear weapons – could assume many forms, depending on how they are put forward. They must include, however, the obligation to eliminate current nuclear arsenals in a transparent, verifiable and irreversible manner, as well as specific obligations dealing with the production and existing stockpiles of weapons' grade fissile material, so as to achieve in a timely manner their complete disposal under effective international control.

4. It must be noted that the differentiation between end-state and *interim* measures does not imply precedence. In fact, insofar as much of the definition of the interim measures depends on the proposed end-state, it is plausible to argue that it is more practical to first consider, and possibly negotiate, the elements necessary to maintaining a nuclear weapon-free world, which is tantamount to define how such a world would be, and then define the steps to proceed towards it.

What effective legal measures, provisions and norms in addition to those that currently exist need to be concluded to attain and maintain a world without nuclear weapons, and what are their respective advantages and disadvantages?

5. This issue has been discussed at length in the New Agenda Coalition's working papers on Article VI of the NPT presented during the 2010-2015 NPT Review Cycle (NPT/CONF.2015/PC.III/WP.18 and NPT/CONF.2015/WP.9), which outlined the four most widely discussed proposals on the subject (comprehensive convention, ban treaty, framework agreement or hybrid arrangement).

6. These proposals vary in ambition (comprehensive convention versus ban treaty, for instance) and juridical nature (one standalone instrument versus a set of partial instruments). Their pros and cons, however, vary significantly according to one's own assessment of current disarmament efforts and overall trends, which by its turn affects how we ponder the feasibility and practicality of each approach.

7. The comprehensive convention – which would address all issues pertaining to nuclear weapons, including the fundamental prohibitions and obligations of States, the elimination of nuclear arsenals and the future all-encompassing non-proliferation regime – is, by its own merits, the most desirable approach. However, for such an approach to be feasible, it would require engagement in good faith from all stakeholders, including the States which possess nuclear weapons.

8. A ban treaty would provide the basic prohibitions and obligations for all States Parties to it and set the political objectives of the international community with regard to the complete elimination of nuclear weapons. It would not have an immediate effect on the existing nuclear arsenals, but it would have a political as well as legal impact on the disarmament debate. It would also set out a compass for further initiatives regarding the actual elimination of nuclear weapons. Since it does not need to be universal at its inception,

it could be a more practical way to take forward multilateral nuclear disarmament negotiations.

9. A framework agreement, comprising either a set of mutually reinforcing instruments dealing progressively with various aspects of the nuclear disarmament process, or a head agreement followed by subsidiary agreements or protocols thereto, would ideally make gradual improvements towards a nuclear weapons free world, providing for flexibility and room for confidence building measures. In theory, this approach would provide for a smooth transition from the nuclear *status quo* to nuclear disarmament, taking into account the concerns of all States simultaneously. It does not provide, however, a clear political goal or even an aspirational time frame, allowing for a few countries, which feel comfortable with the status quo, to stall the whole process indefinitely. This has been more or less the main approach in the last few decades, and it has yielded negligible results.

10. The pros and cons of the hybrid approach will depend on which elements it would take from the three previous options. One possibility, for instance, would be to have a ban treaty to be complemented by protocols on the elimination of nuclear arsenals and on the non-discriminatory verification regime to be implemented after the dismantlement of all nuclear weapons.

11. According to this hybrid possibility, the ban treaty would have, at the outset, the characteristics of a comprehensive instrument, delineating end-state legal measures (see paragraph 2), namely prohibitions on use, possession, stockpiling, transfer, production and development of nuclear weapons and fissile materials for nuclear weapons. It would also have to address questions related to the engagement of States parties in military operations with nuclear-armed non-parties. The treaty, however, would not have to immediately include *interim* measures leading up to the elimination of current nuclear arsenals.

12. It is important to recall that the humanitarian pledge does not specify whether prohibition could be separated from the process of physical elimination, and, if so, which to pursue first. The question of sequencing is, therefore, significant. Under the plausible assumption that no nuclear-weapon State – *de jure* or *de facto* – would support the conclusion of a ban treaty or join it before it enters into force, there would be no political urgency in negotiating immediately the destruction of current arsenals and its verification instruments. Those measures could be the subject of future negotiations of a model-protocol, especially after one (or more) nuclear-weapon State joins the treaty. This model protocol could be inspired in the INFCIRC/153 of the IAEA – which is an agreement to structure the safeguards arrangements between the Agency and States parties. This would provide the instrument with sufficient flexibility, leaving the door open for future accessions.

13. The "general obligations" section under the model convention submitted by Costa Rica and Malaysia to the General Assembly of the United Nations in 2007 (A/62/50) could be used as an initial draft for negotiations of the ban treaty. Although this option would not immediately address concerns regarding the existing nuclear weapons, it would certainly constitute an enormous progress in creating an explicit international prohibition on the use, development and possession of nuclear weapons, filling the legal gap and covering whatever is left of hypothetical "legal" use of those weapons.

What international legal architecture is needed and how could those new arrangements be applied in complementarity with existing legal measures and provisions? – Would obligations under existing international instruments need to be harmonized or streamlined?

14. The current global governance system led by the United Nations has the legitimacy and effectiveness to negotiate and support the implementation of the aforementioned legal

measures. The General Assembly, in particular, is the world's most representative forum and, as mandated by Article 11 of the Charter of the United Nations, has the prerogative to consider disarmament issues. Other United Nations or United Nations related institutions, such as those comprising the disarmament machinery (the First Committee, the Disarmament Commission and the Conference on Disarmament) and the International Atomic Energy Agency can also play important roles in this process. Particularly the IAEA, with its technical expertise and legitimacy, should play an active role in verifying nuclear disarmament as well as non-proliferation in a post nuclear weapons world.

15. Further legal instruments aiming at prohibiting and eliminating nuclear weapons will complement existing ones. The historical precedent of prohibiting and eliminating weapons of mass destruction has shown that, as new and more precise legal instruments were agreed upon, the previous ones stood reinforced in its objectives and aspirations. The *corpus* of international norms concerning weapons of mass destruction is a palimpsest of deepening commitments towards achieving its core objectives. The Convention on the Prohibition of Chemical Weapons, for instance, has not weakened the Geneva Protocol – in fact, it has confirmed its precedent's principles and furthered its objectives.

16. In nuclear disarmament, any of the legal measures being now considered would stand in a similar position with regard to the NPT, reinforcing its core objectives, especially those deriving from Article VI. There is, in this sense, no need to **harmonize** or **streamline**, as there is no contradiction between existing instruments and the ones that are envisioned here. Surely, the provisions which allow nuclear-weapon States under the NPT to temporarily hold nuclear weapons will cease to have effect, but this would be the **realization** of the NPT, not its demise. The temporary nature of these provisions is obvious from the inner logic that governs the Treaty, underpinned by Article VI.